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Regulation (EC) n. 650/2012 of July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession

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EXECUTIVE SUMMARY

The newly adopted Regulation (EU) No 650/2012 is an ambitious instrument dealing exhaustively with every private international law aspects in regard to cross-border successions. The Regulation aims at harmonizing private international law rules so as to enable individuals to organize more efficiently and more rapidly their successions within the area of freedom, security and justice. The present paper addressed the main innovations, advantages and pitfalls of the new Regulation.

1. Coincidence between forum and ius, reflecting the objectives of simplicity and predictability

As stated at recital 27, the rules of this Regulation are devised so as to endure that the authority dealing with the succession will, in most situations, be applying its own law. Accordingly, at Articles 4-12; 5-22; 6-22 the Regulation facilitates, by way of principle, the synchronisation of the competent court and the applicable law.

Advantage: judicial efficiency. Proceedings are easier to conduct, less time-consuming and less expensive when a court applies its own law. In fact, trying to scrutinize the content of a foreign law delays proceedings and increases costs. Moreover, by facilitating, in as much as possible, the coincidence between forum and ius, the Regulation also reduces the potential recourse to the public policy clause under Article 35 which protects the forum's fundamental values.

2. Habitual residence

Habitual residence is adopted in the Regulation as the central criterion for jurisdiction and applicable law. The place of habitual residence usually corresponds to the place where the hereditary assets are situated, and in many EU Member States this criterion is used as connecting factor to establish the law applicable to the succession.

The adoption of habitual residence (in lieu of nationality) as the relevant criterion enhances flexibility; however habitual residence may be difficult to prove and nationality corresponds to a lifetime affiliation of a person to a legal system.

As for the applicable law, the escape clause at Article 21(2) – by providing that where it is clear from all the circumstances of the case that the deceased was more closely connected with a State other that that of his habitual residence, the law of the State with which he was more closely connected should govern his succession – appears to introduce an element of unpredictability, whereas it actually facilitates the "proper law". In the case, for example, of an individual who dies after having only recently moved to a Member State, the parties concerned with his succession (heirs, legatees and creditors) may see as unexpected the fact that the law of the Member State where the deceased had just moved governs his succession. The escape clause, by giving relevance to the law of the State with which the deceased was more closely connected, is likely to satisfy the parties' reasonable expectations.

3. Party autonomy

Party autonomy is framed to ensure the coincidence between forum and ius and to facilitate estate planning. According to party autonomy, the testator is allowed to designate his national law as the law governing his succession as a whole, by expressing his choice expressly and in testamentary form. Such provision shall mitigate the side effects of the potential abstractness and inadequacy of habitual residence as the general rule. Moreover, it allows the testator to carry out an effective localization of the – not only financial, but also personal and of affection – elements that connect him to his State of nationality.

4. Universal application
Article 20 of the Regulation provides that any law specified by the Regulation shall be applied whether or not it is the law of a Member State. This provision facilitates the uniform solution of cross-border disputes in succession matters. The Member States' goal with adopting this Regulation is to concur in creating a European judicial area in civil matters. Such a goal cannot but be pursued by means of an harmonized and comprehensive discipline.

5. Unity of the succession
Consistently with the majority of the national legislation of Member States, the Regulation adopts the principle of the unity of the succession. As a result, the law applicable to the succession will govern the succession as a whole, regardless of the nature of the assets (movables or immovables).

6. Agreements as to succession
The provisions on agreements as to succession and joint and mutual wills clarify the pre-requisites for the verification of validity of such agreements and, in perspective, facilitate the acceptance of the validity of these agreements by those legal systems that, to this date, consider them invalid on a domestic level. The provisions clearly facilitate estate planning.

7. Authentic instruments and court settlements
According to Article 59 of the Regulation, authentic instruments are not technically recognized and they are, rather, "accepted". Unlike judgments, the legal effects of these instruments are not sufficiently clear. Moreover, the term "acceptance" has not been defined and there remains uncertainty regarding its legal effects.

8. European Certificate of Succession
The European Certificate of Succession is one of the major innovations of Regulation No 650/2012. The ECS is a standard form certificate designed to enable heirs, legatees, executors or administrators to prove their legal status and/or rights. As regards jurisdiction, the courts having jurisdiction according to Chapter II are also competent to issue an ECS, and the procedure to obtain the ECS is clearly detailed in the Regulation at Articles 65-68. The use of a standard form is a considerable means as to enhance an efficient and rapid settlement of successions by implementing the free movement of decisions. According to Article 62, the use of the ECS is optional and it should not be a substitute for existing national certificates. However, as the ECS is an optional instrument, it is unlikely to be used. Moreover, the relation between the ECS and national certificates has remained unsettled, thus creating considerable uncertainty until the ECJ has clarified this issue.

1. INTRODUCTION

The diversity of rules and systems that apply to successions in different Member States can make for considerable complications when addressing a cross-border succession.[1] For this reason, efforts to simplify and clarify the rules that apply to international successions can produce huge benefits for individuals in the European Union judicial area.

The newly adopted Regulation (EU) No. 650/2012 is an ambitious instrument that deals exhaustively with private international and procedural law aspects in regard to cross-border successions. The Regulation aims at harmonizing private international and procedural law rules so as to enable individuals to organize more efficiently and more rapidly their successions within the European Union's area of freedom, security and justice. Accordingly, the new Regulation shall coordinate the divergent national laws on succession in cross-border situations. To this aim, the scope of the Regulation, adopted by the European Parliament and the Council on 4 July 2012, is so broad as to encompass jurisdiction, applicable law, recognition and enforcement of foreign judgments in succession matters, as well as acceptance and enforcement of authentic instruments and the creation of a European Certificate of Successions.

The Regulation is articulated in a long and complex text that unwinds in 83 Recitals, followed by 84 Articles. In its seven Chapters, the Regulation addresses a significant number of succession matters, including testate and intestate successions, party autonomy, agreements as to successions and joint wills, *commorientes*, and estate without a claimant, among the others. Nonetheless, many issues are excluded from the scope of the Regulation, which may lead to uncertainties with regard to the delineation of, e.g., rights *in rem* and recourse to the register of rights.

The present Report features an Executive Summary and a General Report, which address the main innovations, advantages and pitfalls of the new Regulation that shall apply as of 17 August 2015.

1.1. Rules on jurisdiction

As regards jurisdiction, the link to the last habitual residence of the deceased, which applies according to the specific circumstances of each case, is not readily reconcilable with the principle of clarity of jurisdiction. The definition provided for by the Recitals does not give much guidance as it refers to an "overall assessment of the circumstances of the deceased during the years preceding his death and at the time of his death". It remains to be seen whether the ECJ will be able to formulate more precise criteria.

Likewise, the possibility of prorogation of the testator's 'jurisdiction of origin' agreed in the Council does not seem entirely consistent. On the one hand, the prorogation requires that the testator's *lex patriae* be chosen, while at the same time requiring the consent of all those involved in the succession procedure. This will not happen – particularly in cases where succession is disputed. For that reason it seems preferable to allow the testator to determine the jurisdiction (while observing the principle of synchrony). Prorogation of the 'jurisdiction of origin' should also be possible if all of those involved wish to handle the question of succession in the local jurisdiction.

[1] Information on the 27 succession laws of the EU-member States is found at www.successions-europe.eu, a website maintained by the EU-Commission and the Network of European notaries.

Provisions on cooperation between probate courts are lacking. The rules on *lis pendens* laid down in Article 27 et seq. of the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters are not convincing as they do not provide for any direct communication among judges.

1.2. Applicable law

1.2.1 Habitual residence

Habitual residence is adopted in the Regulation as the central criterion not only for jurisdiction but also for applicable law. The place of habitual residence usually represents a genuine link between the succession and a State, and in many EU Member States this criterion is used as connecting factor to establish the law applicable to the succession. The adoption of habitual residence (in lieu of nationality) as the relevant criterion enhances flexibility; however habitual residence may be difficult to prove. Moreover, this criterion poses problems to the extent that it allows some room for manipulation.

The escape clause at Article 21 (2) appears to introduce an element of unpredictability, whereas it actually facilitates the 'proper law'. In the case, for example, of an individual who dies after having only recently moved to a Member State, the parties concerned with his succession (heirs, legatees and creditors) may see as unexpected the fact that the law of the Member State where the deceased had just moved governs his succession. The escape clause, by giving relevance to the law of the State with which the deceased was more closely connected, is likely to satisfy the parties' reasonable expectations.

As stated at Recital 27, the rules of the Regulation on cross-border successions are devised so as to endure that the authority dealing with the succession will, in most situations, be applying its own law. Accordingly, by means of the interplay of Articles 4 and 12 the Regulation facilitates, by providing that habitual residence be the relevant criterion for both jurisdiction and applicable law, the parallelism between forum and *ius*, as such enhancing judicial efficiency. Proceedings are easier to conduct, less time-consuming and less expensive when a court applies its own law. In fact, trying to scrutinize the content of a foreign law delays proceedings and increases costs. Moreover, by facilitating, in as much as possible, the coincidence between forum and *ius*, the Regulation also excludes the need to make recourse to the public policy clause under Article 35. The parallelism between forum and *ius* is also facilitated by the interplay of Articles 5 and 22 on party autonomy, as well as Articles 6 and 22 on discretion to decline jurisdiction, respectively.

Article 31 of the Regulation provides for the adaptation of an unknown right *in rem* provided by the *lex successionis* to the "closest equivalent right *in rem*" under the law of the Member State where the property is situated. Assuming that the authorities in the Member State where the property is situated can agree on which national right *in rem* is closest to the right claimed under the *lex successionis*, there is no requirement under the Regulation to change the domestic law on registry rules to show that ownership of the property is subject to the right *in rem* provided pursuant to the *lex successionis*. Hence, the foreign right *in rem* would be effective but not publicised in the local register. This could clearly promote uncertainties as to the legal status of the property especially towards third parties, with the result of increasing the chances of difficulties or disputes if the land is later sold to a third party. As a result of the fact that pursuant to Article 23 (1) lit e) the Regulation governs the law applicable to the transfer of the assets, rights and obligations forming part of the estate to the heirs,

but that in some Member States the transfer is qualified as a transaction of rights *in rem* and not as a transfer succession, the main problem in this respect is the delineation between property and succession law.

1.2.2 Party autonomy

Party autonomy is framed to ensure the parallelism between forum and *ius* and to facilitate estate planning. Pursuant to Article 22 of the Regulation, the testator is allowed to designate his national law as the law governing his succession as a whole, by stating his choice expressly and in testamentary form. Such provision shall mitigate the side effects of the potential abstractness and inadequacy of habitual residence as the general rule. Moreover, it allows the testator to carry out an effective localization of the – not only financial, but also personal and of affection – elements that connect him to his State of nationality.

The provisions on agreements as to succession and dispositions of property upon death clarify the pre-requisites for the verification of validity of such agreements and, in perspective, facilitate the acceptance of the validity of these agreements by those legal systems that, to this date, consider them invalid on a domestic level. The provisions clearly facilitate estate planning. However, while the definition of joint wills is provided at Article 3 lit c), the Regulation's provisions on joint wills would have benefitted from major clarity.

The transitional provisions ensure continuity to the choice of the applicable law and to disposition of property upon death made prior to the Regulation's entry into force, provided that the choice of law and the disposition meet the conditions laid down in the Regulation. However, the text remains silent as for the grounds for contesting or revoking wills prior to the Regulation's entry into force.

1.2.3 Universal application

Article 20 of the Regulation provides that any law specified by the Regulation shall be applied whether or not it is the law of a Member State. This provision facilitates the uniform solution of cross-border disputes in succession matters. The Member States' goal with adopting this Regulation is to concur in creating a European judicial area in civil matters. Such a goal cannot but be pursued by means of a harmonized and comprehensive discipline.

1.2.4 Unity of the succession

Consistently with the majority of the national legislation of Member States, the Regulation adopts the principle of the unity of the succession. As a result, the law applicable to the succession will govern the succession as a whole, regardless of the nature of the assets (movables or immovables).

1.3. Cross-border enforcement of decisions

The Regulation on cross-border successions has laid down rules relating to recognition, enforceability and enforcement of decisions which are similar to the provisions adopted with other European Union private international law instruments, and notably to the Brussels I Regulation. In the respect of the principle mutual trust between Member States, the Regulation on cross-border successions will enable recognition of judgments without review of substance or of the applicable law: The Regulation provides for the automatic recognition (i.e., without any special procedure being

required) of a judgment rendered in another Member State, with limited grounds for non-recognition. Nevertheless, the Regulation still requires an *exequatur* procedure. By modeling the *exequatur* proceedings according to the Brussels I Regulation, the European legislator copied the grounds for non-recognition of Article 34 of this instrument. However, the question remains whether these grounds for non-recognition are well suited for succession matters.

1.4. Authentic instruments and court settlements

The (indiscriminate) cross-border enforcement of public documents has been the subject of heated debate. It is welcome news that eventually, as for authentic instruments, the term "acceptance" has been chosen over "recognition". Essentially, the focus now is on the enforcement of formal evidentiary effect.

In view of the heterogeneous evidentiary effects and the variety of public documents in succession cases, further detail would have been required in the wording of the Regulation. Major restrictions not implied in the wording of the Regulation should not be imposed solely by the Recitals. The cross-border enforcement of the issuing State's assumptions regarding authenticity and factual matters seems sensible. The position is different as regards further effects extending to an act or a legal relationship set out in the official document. A comparative examination of the laws in the relevant jurisdictions should be carried out before any cross-border enforcement. This should take account, in functional and systematic terms, of the various official documents relevant to succession issues and of their evidentiary effect.

1.5. European Certificate of Succession

The European Certificate of Succession is one of the major innovations introduced with Regulation No. 650/2012. The European Certificate of Succession is a standard form certificate designed to enable heirs, legatees, executors or administrators to prove their legal status and/or rights. As the European Certificate of Succession is an optional instrument, it is unlikely that it will be actually often used. Moreover, the relation between the European Certificate of Succession and national certificates has remained unsettled, thus creating considerable uncertainty.

2. GENERAL REPORT

2.1. Rules on jurisdiction

2.1.1 Habitual residence

Habitual residence at the time of death is adopted in the Regulation as the central criterion for both jurisdiction and applicable law. The legislative technique of synchronizing jurisdiction and applicable law seems to be sound as it avoids unnecessary delays and costs caused by the assessment and application of a foreign law.

In practice, the adoption of habitual residence as the criterion for fixing the competent court may be difficult to prove. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death. Factors that are deemed to be potentially indicative of habitual residence are found in the Recitals 23 and 24 of the Regulation: The Recitals refer to the following criteria: the place where a person has been registered to live; the place where a work permit is issued; the place of physical presence; the centre of interest of family and social life; the place where the deceased's main assets are located; the place where the deceased's creditors are located; the place where all or the majority of the heirs live. All these factors can be relevant, nonetheless none of them is decisive, and a hierarchy between them has not been established. The case-law of the ECJ (mainly dealing with the Brussels II^{bis} Regulation) does not provide for much guidance either as the Court equally assesses all pertinent circumstances of the case.[2]

On the other hand, it must be stated that legal science has not developed a more suitable criterion. In many cases, assets of the deceased will be found at his or her last permanent residence. In these cases, fixing jurisdiction at the place of the center of interests of the deceased might be the appropriate solution. However, there are circumstances where citizens from the northern part are living in Member States located at the Mediterranean Sea in winter, although they return to their countries of origin in summer. In these cases, fixing the permanent residence may turn out to be very difficult.[3]

2.1.2 Prorogation

The second head of jurisdiction provided for by the Regulation is based on consent: According to Article 5 all parties concerned may conclude a choice-of-court agreement. The prorogation of the competent court is limited, however, to the case where the deceased had chosen the law of the Member State of his origin (nationality) to govern his succession (Article 22). In this case, the parties concerned can agree that the proceedings shall not take place at the last habitual residence of the defunct, but in the Member State of his nationality instead. However, the heir cannot designate unilaterally the competent court for the succession of his assets.[4] It seems to be

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[2] ECJ, 4/2/2009, case C-523/07, „A", ECR 2009 I-2805, para. 37 et seq.; ECJ, 10/22/2010, case. C-497/10PPU, *Mercredi / Chaffe*, ECJ, verb. Rs. C-509/09 *eDateAdvertsing GmbH / X* and C-161/10 *Olivier Martinez* and *Robert Martinez / Société MGN Limited*, para. 50, not yet published.

[3] *Geimer*, in: Reichelt/Rechberger (Hrg.), Europäisches Erbrecht (2011), p. 1, 10 et seq.

[4] This solution is based on the idea that the heir shall not be empowered to designate the competent court against the will of the parties of (a future) litigation. The main objective is to protect the family of the

doubtful whether this complicated mechanism will operate efficiently. On the one hand, it requires an explicit agreement of all interested parties which might be difficult to reach when the succession is disputed. In addition, getting the consensus of all interested parties may be a difficult task as these persons are not always known at the beginning of succession proceedings. All in all, it is expected that the practical importance of Article 6 will be limited.

2.1.3 Declining of jurisdiction in the event of a choice of law

At Article 6 (1), the Regulation provides that where the law chosen by the deceased to govern his succession is the law of a Member State, the court seised may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are "better placed" to rule on the succession. In considering whether to decline jurisdiction, the court shall take into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets. In granting discretion to decline jurisdiction upon the seised court, this provision makes use of forum *non conveniens*, a legal mechanism which originates in the common law system and which is employed in the Regulation by the European Union legislator to facilitate the parallelism between forum and *ius*: The provision, in fact, allows the court seised under the general criterion of habitual residence or the court seised under the provision on subsidiary jurisdiction (see *infra*) to decline jurisdiction in favour of the court of the Member State whose law has been chosen by the testator to govern his succession.[5]

Interestingly, under Article 6 (1) lit a) discretion to decline jurisdiction is afforded to the court on request of just one of the parties to the proceedings, unlike the exclusive choice-of-court agreement at Article 5 (1) of the Regulation, which requires that all parties agree to establish the competence of the Member State whose law the testator devised to govern his succession. It is deemed that such a solution has been drafted to allow the court to find a judicially efficient solution where the deceased only lived for a short while in a Member State other than that of his nationality, he chose his national law to govern his succession, his heirs and legatees remained in his Member State of origin but they have not entered in a choice-of-court agreement under Article 5 of the Regulation. This balanced provision must be welcomed.

However, the European legislator did not address the situation where the deceased did not choose his law of origin, but all interested parties (his children) are domiciled in this Member State. Just imagine a case where, just prior to his death, the deceased relocates from Finland to Spain and dies a few months after his arrival. If the deceased has not selected the succession law of his origin, the interested parties must initiate the succession proceedings in Spain although they are all domiciled in Finland. This solution does not seem to be appropriate for a smooth and unburdensome processing and distribution of the estate.[6]

From a procedural perspective, it should be noted that the judicial cooperation among the courts of the habitual residence and the origin of the deceased has not been

deceased in case of disinheritance, see *Hess/Jayme/Pfeiffer*, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 20 et seq.

[5] It should be noted that this mechanism is not entirely new in the European law of civil procedure – a similar mechanism is found in Article 15 of the Regulation Brussels IIbis see *Hess*, Europäisches Zivilprozessrecht (2010), § 7 paras 69 et seq. On forum non conveniens in the EU judicial area cf. *Mariottini*, in: Pocar/Viarengo/Villata (eds), Recasting Brussels I (2012), p. 285 et seq.

[6] *Hess/Jayme/Pfeiffer*, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 22.

addressed by the Regulation. Despite considerable development in this area of law, the instrument does not provide for direct communications among judges, although there is a compelling need for an improved coordination in the context of Articles 6 to 8 of the Regulation[7] Furthermore, with regard to parallel proceedings, Articles 17 and 18 of the Regulation simply copy the mechanism of the Brussels I Regulation, although the recast provides for a more balanced solution – especially in the context of choice of court agreements.[8]

2.1.4 Subsidiary jurisdiction

At Article 10 (1), the Regulation holds that where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are situated shall nonetheless have jurisdiction to rule on the succession as a whole so far as the deceased was a national of that Member State at the time he died or, failing that, he had his previous habitual residence in that Member State, provided that no more than five years have elapsed from the time the habitual residence changed and the court is seised. Thus, this provision establishes a subsidiary jurisdiction, which is meant to step in when the deceased's habitual residence was located in a third State, but assets of the estate are situated in a Member State's territory. Moreover, where no Member State court has jurisdiction under Article 10 (1), Article 10 (2) of the Regulation provides that the courts of the Member State in which assets are located shall nevertheless have jurisdiction to rule on those assets, as opposed to the succession as a whole. This provision introduces a concession from the unitary approach to the succession, which is however justified by the weaker connection that ties the succession to the Member State: In the case at issue, in fact, the only relevant connection between the succession and the court is the presence of the deceased's assets in the Member State's territory.

Overall, subsidiary jurisdiction clearly strengthens Member States' jurisdiction, by avoiding a potential gap in the jurisdiction of the EU Member States where the deceased's assets are situated: In the hypothesis where the last habitual residence of the deceased is in a third country, Article 10 of the Regulation ensures to heirs, legatees and creditors access to justice before the courts of such Member States.

2.1.5 *Forum necessitatis*

Another potential gap in the jurisdiction of Member States as a result of the deceased's last habitual residence in a third State is filled at Article 11 of the Regulation whereby, where no court of a Member State has jurisdiction pursuant to other provisions of the Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or, again, they would be impossible in a third State with which the case is closely connected. The case, however, must have a sufficient connection with the Member State of the court seised, in order to establish jurisdiction in that Member State.

In order to avoid the denial of justice in situations that have a sufficient connection with the court seised, the discretionary exercise of jurisdiction provided at Article 11 aims at ensuring an available forum when a dispute does not fit within the other rules of jurisdiction pursuant to the Regulation. This provision introduces, in the interests of

[7] *Hess/Jayme/Pfeiffer*, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 23.

[8] *Dickinson*, YbPIL 2011, p. 266 et seq.

justice, a new ground of jurisdiction for EU plaintiffs who would otherwise be deprived of an adequate forum outside the European Union in which to litigate their disputes.

The provisions on subsidiary jurisdiction and on *forum necessitatis* are interesting from a legal-political perspective: These provisions openly address third-State situations[9] and confer to the European Union, according to the case-law of the ECJ, the exclusive competence in this area of law.[10] Recently, the Commission proposed similar provisions with regard to the recast of the Regulation Brussels I.[11] However, the national governments in the Council strongly opposed to that proposal which – unfortunately – failed in the legislative process. The Succession Regulation demonstrates that there is a need for including third-State situations not only at the level of private international law, but also with regard to jurisdiction. Against this backdrop, it must be regretted that the proposal of the EU-Commission for the reform of the Insolvency Regulation does not address third-State situations.[12]

2.1.6 General assessment of the rules on jurisdiction

Assessing the rules of the Regulation on jurisdiction is not an easy task: On the one hand, the reliance on the last permanent residence of the deceased as a general connecting factor for jurisdiction does not seem to correspond to the general need of predictability and legal certainty. As a result, long lasting disputes on jurisdiction cannot be excluded. It should be noted that the criterion of the last permanent residence of the deceased is much more appropriate as a connecting factor in private international law rather than for jurisdictional issues.

The more flexible approach regarding choice of court agreements has to be welcomed. However, the Regulation embraces too much the objective of a parallelism of the competent forum and the applicable law. Thus, choice of court agreements are only permitted insofar as the deceased chose the law of his origin and the interested parties transfer the succession proceedings to the State of origin. Future amendments of the Regulation should enlarge the option of transferring succession proceedings to the most appropriate court,[13] and expressly provide for communication among the courts addressing the issue.

2.2. Applicable law

2.2.1 Habitual residence

Habitual residence is adopted in the Regulation as the central criterion not only for jurisdiction but also for applicable law. The place of habitual residence often corresponds to the place where the hereditary assets are situated, and in many EU Member States this criterion is used as connecting factor to establish the law applicable to the succession. As it may be observed with reference to the adoption of this criterion for jurisdictional purposes, the adoption of habitual residence (in lieu of

[9] In this respect, the United Kingdom which finally opted out after lengthy and delaying negotiations is to be considered as a third State.

[10] ECJ, opinion 1/2003, 2/7/2006, Lugano-Convention, ECR 2006 I-1145, paras 139 et seq.

[11] On the proposal for a recast of the Brussels I Regulation cf. esp. *Pocar/Viarengo/Villata* (eds), Recasting Brussels I (2012); *Lein* (ed.), The Brussels I Review Proposal Uncovered (2012).

[12] COM (2012) XXX of 12/13/2012.

[13] In the sense of a "jurisdicitional escape clause".

nationality) as the relevant criterion enhances flexibility, it coincides with the center of interests of the deceased and thus often with the place where most of the assets are located. However, habitual residence may be difficult to prove. Moreover, this criterion poses problems to the extent that it allows some room for manipulation.[14]

As stated at Recital 27, the rules of Regulation No. 650/2012 are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. Accordingly, the interplay of Articles 4 and 12 facilitates, by way of principle, the parallelism of forum and *ius*. This legislative solution puts forward the advantage of facilitating judicial efficiency, reflecting the Regulation's objectives of simplicity and predictability. Proceedings are easier to conduct, less time-consuming and less expensive when a court applies its own law. In fact, trying to scrutinize the content of a foreign law delays proceedings and increases costs. Moreover, by facilitating, in as much as possible, the coincidence between forum and *ius*, the Regulation also reduces the potential recourse to the public policy clause under Article 35.

The adoption of habitual residence as the relevant general criterion for both jurisdiction and conflict-of-laws purposes should allow to subject to the same law both succession matters and matrimonial property issues given that the latter, absent a choice of law, is by way of principle governed by the law of the State of common habitual residence of the spouses pursuant to Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. This should be welcomed as a positive feature, as it helps avoiding potential conflicts and unfairness that may arise as a result of the two issues being governed by different laws.

2.2.2 Escape clause

The escape clause at Article 21 (2) – by providing that where it is clear from all the circumstances of the case that the deceased was more closely connected with a State other than that of his habitual residence, the law of the State with which he was more closely connected should govern his succession – appears to introduce an element of unpredictability, whereas it actually facilitates the 'proper law'. In the case, for example, of an individual who dies after having only recently moved to a Member State, the parties concerned with his succession (heirs, legatees and creditors) may see as unexpected the fact that the law of the Member State where the deceased had just moved governs his succession.[15] The escape clause, by giving relevance to the law of the State with which the deceased was more closely connected, is likely to satisfy the parties' reasonable expectations.

2.2.3 Party autonomy

In Regulation No. 650/2012 party autonomy is framed to facilitate estate planning, in addition to ensuring, once again, the parallelism between forum and *ius*. Regardless of the clear advantages brought by the adoption of habitual residence as the general

[14] *Hess/Jayme/Pfeiffer*, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012 – Executive Summary, p. 3. On the application of the law of the deceased's habitual residence see *Bonomi*, in: Boele-Woelki/Einhorn/Girsberger/Symeonides (eds), Convergence and divergence in Private International Law – Liber Amicorum Kurt Siehr (2010), p.157 et seq., esp. 163 et seq.

[15] Unfortunately, the Regulation does not provide for a parallel "escape clause" in the area of jurisdiction, see supra at footnote 14.

criterion not only for jurisdiction, but also for applicable law, such a criterion – absent an autonomous notion in the Regulation – is potentially unstable as a result of its mutability and of the objective difficulties in its identification.[16] Such instability may lead to positive conflicts of both jurisdiction and applicable law which are not consistent with the aim of uniformity in the international solution of disputes in the European Union judicial area, to the detriment of the expectations of the person's whose succession is concerned and of the other parties. To the aim of tempering these pitfalls, and as a means of reconciling the principle of nationality and the principle of habitual residence,[17] the Regulation acknowledges to the testator the possibility to choose the law applicable to his succession (*professio legis* or *optio iuris*).[18] By stating his choice expressly[19] and in testamentary form, the testator is in fact allowed to designate his national law, either at the time the choice is made or at the time of death, as the law governing his succession as a whole. Such provision shall mitigate the side effects of the potential abstractness and inadequacy of habitual residence as the general rule. Moreover, the introduction in the Regulation of party autonomy allows the testator to carry out an effective localization of the – not only financial, but also personal and of affection – elements that connect him to his State of nationality.[20]

As for the parallelism of forum and *ius*, Article 5 of the Regulation provides that where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned by the succession may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any matter regarding the succession. This provision clearly facilitates estate planning.

Furthermore, the limitation of party autonomy to the law of the State of nationality aims at ensuring a real and genuine connection between the deceased and the law chosen, and at avoiding a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share. Nonetheless, the question has been raised of the opportunity of extending party autonomy to the court and law also chosen by the spouses to govern their matrimonial property under Regulation No. 1259/2010 on the law applicable to divorce and legal separation, and complaints have been addressed to the lack of coordination of the Regulation on cross-border successions with the Regulation on the law applicable to divorce and legal separation.

2.2.4 Adaptation of rights *in rem*

At Article 1 lit k) and l), the Regulation excludes from the scope of application the nature of rights *in rem*, as well as any recording in a register of rights in immovable or

[16] *Bonomi*, in: Boele-Woelki/Einhorn/Girsberger/Symeonides (eds), Convergence and divergence in Private International Law – Liber Amicorum Kurt Siehr (2010), p.157 et seq., esp. 166 et seq.; *Id*., in: 350 Recueil des Cours (2011), esp. p. 172 et seq.

[17] *Jayme*, YbPIL 11 (2009), 1 et seq., esp. at 2.

[18] As observed by H.-P. *Mansel* and shared by P. *Kindler*, there appears to be a further legitimation in applying the law of nationality as a result of the fact that the deceased can theoretically influence the composition of the legislative body of his State of nationality and, accordingly, he can indirectly influence the succession law of his country. Cf., respectively, *Mansel*, in: Arkan/Yongalik/Sit (eds), Tuğrul Ansay'a Armağan (2006), p. 185 et seq.; *Kindler*, in: Boele-Woelki/Einhorn/Girsberger/Symeonides (eds), Convergence and divergence in Private International Law – Liber Amicorum Kurt Siehr (2010), p. 251 et seq., esp. at 253.

[19] According to Article 22 (2), the choice of the applicable law can also be implicitly derived from the terms of a disposition where the deceased explicitly refers to a provision of the applicable law, see Recital 40.

[20] See Recital 38.

movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register. As the Commission explained in its Explanatory Memorandum to the proposal that subsequently led to the adoption of Regulation No. 650/2012, this provision is intended to prevent the introduction into a Member State of a right in relation to real property which is not found in its law.[21] The Commission used the example of a usufruct, which is the right of a person to use and derive profit or benefit from property that belongs to another. The Regulation does not aim at affecting the limited number of rights *in rem* known in the national law of some Member States (cf. Recital 15): In fact, a Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law.[22]

Nonetheless, Article 31 of the Regulation provides for the adaptation of an unknown right *in rem* to the "closest equivalent right *in rem*" under the law of the Member State where property is located. As stated at Recital 16, in the context of such an adaptation account should be taken of the aims and the interests pursued by the specific right *in rem* and the effects attached to it. For the purposes of determining the closest equivalent national right *in rem*, use can be made of the existing networks in the area of judicial cooperation in civil and commercial matters, as well as any other available means facilitating the understanding of foreign law[23] Nonetheless, this provision carries evident uncertainties and difficulties: The actual possibility for the authorities of a Member State where property is situated to determine – if at all possible – which is the closest equivalent right *in rem* to the right claimed under the *lex successionis* may not be possible in the first place. Assuming the right claimed is, as in the example put forward by the Commission, an usufruct, the State where the property is located would have to go at lengths to determine the closest equivalent national right *in rem*, in a process which may turn out to be costly and time consuming. Moreover, assuming that the authorities could agree on which national right *in rem* is closest to the right claimed under the *lex successionis*, there is no requirement to change the domestic law on registry rules to show that ownership of the property was subject to the usufruct. Hence, the usufruct would be effective but not publicised in the local register. This could clearly promote uncertainties as to the legal status of the property especially towards third parties, with the result of increasing the chances of difficulties or disputes if the land is later sold to a third party.[24]

The main problem in this respect is the delineation between property and succession law. According to its Article 23 (1) lit e) the Regulation governs the law applicable to the transfer of the assets, rights and obligations forming part of the estate to the heirs. However, in some Member States, the transfer is qualified as a transaction of rights *in rem* and not as a transfer succession.[25]

[21] COM (2009) 154 final, at p. 5.

[22] Bundesgerichtshof, 9/28/1994, Neue Juristische Wochenschrift (1995), p. 58.

[23] Against the backdrop of the considerable differences of the substantive laws in this area this reference must be considered as "wishful thinking". Basic information on the succession laws of the EU-Member States is found at the new website www.successions-europe.eu operated by the EU-Commission.

[24] *House of Lords, European Union Committee*, Sixth Report: The EU's Regulation on Succession, 9 March 2010, esp. paras 77 et seq.

[25] *Laukemann*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 36 et seq.

2.2.5 Agreements as to succession

Agreements as to succession fall within the category of dispositions of property upon death. Pursuant to Article 25 of the Regulation, the admissibility of such agreements, their substantive validity and their binding effects between the parties shall be governed by the law which, pursuant to the Regulation, would have governed the succession of the party to the agreement if the party had died on the day on which the agreement was concluded. The clear foreseeability of the law governing such pacts is regulated in the Regulation to the clear benefit of estate planning.[26]

Overall, the admissibility and acceptance of agreements as to successions vary among Member States. In fact, EU Member States of roman tradition, such as France, Belgium, Luxembourg, Italy, Spain and Portugal currently prohibit joint wills or agreements regarding successions.[27] However, because the reasons for such interdictions are being progressively considered outdated, national jurisprudence and legal practice have already given a restrictive interpretation to those interdictions where the deceased has made use of them under a foreign law. The Regulation now ensures that such cross-border agreements be considered as valid and be admitted by Member States (see Recital 40). In fact, in Regulation No. 650/2012 the provisions on agreements as to succession and disposition of property upon death clarify the pre-requisites for the verification of validity of such agreements and, in perspective, it is likely that they will facilitate the acceptance of the validity of these agreements by those legal systems that, to this date, consider them invalid on a domestic level. However, while the definition of joint wills is provided at Article 3 lit c), the Regulation's provisions on joint wills would have benefitted from major clarity.

The transitional provisions (Article 83) ensure the validity of a disposition of property upon death made prior to the Regulation's entry into force, provided that the choice of law and the disposition meet the conditions laid down in the Regulation. However, it is unfortunate that the text remains silent as to the grounds for contesting or revoking wills prior to the Regulation's entry into force.[28]

2.2.6 Universal application

Article 20 of the Regulation provides that any law specified by the Regulation shall be applied whether or not it is the law of a Member State. This provision facilitates the uniform solution of cross-border disputes in succession matters. The Member States' goal with adopting this Regulation is to concur in creating a European judicial area in civil matters, and such a goal can only be pursued by means of a harmonized and comprehensive discipline. As a result, when the law of a third State governs the succession pursuant to the Regulation, the rules of law in force in that State, including the rules of private international law, shall apply in so far as they make *renvoi* to the

[26] In practice, however, it might turn out to be difficult to prove the permanent residence of the deceased of the time when the testament was established – as the Regulation does not provide for an obligation of indicating the date of the agreement, see *Magnus*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 28 et seq.

[27] *Deutsches Notarinstitut* (en coopération avec Dörner/Lagarde), Étude de droit comparé sur les règles de conflits de juridictions et de conflits de lois relatives aux testaments et successions dans les Etats membres de l'Union Européenne. Étude pour la Commission des Communautés Européennes Direction générale Justice et Affaires intérieures. Rapport Final: Synthèse et Conclusions 18 septembre/8 novembre 2002, p. 114.

[28] *Magnus*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 32.

law of a Member State (see *infra*) or to the law of another third State which would apply its own law.

2.3. Unity of the succession and *renvoi*

Consistently with the national legislation of the majority of Member States, the Regulation adopts the principle of the unity of the succession. As a result, the law applicable to the succession will govern the succession as a whole, regardless of the nature of the assets (movables or immovables).[29] This unity could however be frustrated as a result of the possibility, introduced by the Regulation's universal application, that the law applicable pursuant to the Regulation be that of a third State which subjects the succession to different laws based upon the nature of the assets (so-called 'territorial scission'). Nonetheless, such a possibility is acknowledged as part of the necessity to ensure, in as much as possible, uniform solutions to cross-border disputes. Moreover, the possibility of a *renvoi* back to the law of a EU Member State as the result of such a scission mitigates this provision's potential negative impact, and it has been taken into account as a positive feature.

The issue of *renvoi* is addressed namely at Article 34, where it is provided that the application of the law of any third State pursuant to the Regulation means the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi* to the law of a Member State or to the law of another third State which would accept the *renvoi* and apply its own law. Although this provision opens up to the possibility of territorial scission should the applicable law under the Regulation be the law of a legal system that devises the law applicable to succession based upon the nature of the assets (movables or immovables), it nevertheless facilitates the uniform solution of cross-border disputes in succession matters.

2.4. Public policy

At Article 35, the Regulation provides for the ultimate protection to a Member State's fundamental values and policies, i.e. the public policy clause. Under the Regulation's public policy clause, the application of a provision of the law of any State specified by the Regulation may be refused only if such application is "manifestly incompatible" with the public policy of the forum. As stated by the Court of Justice of the European Union, as a result of the principle of predictability and uniformity of the applicable law, the public policy clause may be opposed to the rules of the law otherwise applicable only in truly exceptional cases[30] With reference to Regulation No. 650/2012, the question has been raised of whether and to what extend the reserved portions of an estate, provided by some legal systems, fall under the definition of public policy. Despite the fact that often the provisions on reserved portions are considered as indefeasible only in disputes concerning purely domestic successions, the issue remains open of whether the applicability of a law which disregards (as a whole or partially) the reserved portion(s) provided by the *lex fori* would conflict with the public policy of the forum[31] From the wording of the provision, it appears that mere

[29] On the unitary and dualistic approach to succession law see esp. *Bonomi*, in: 350 Recueil des Cours (2011), esp. p. 99 et seq.

[30] Cf. ECJ, 5/23/1978, Case 102/77 *Hoffmann-La Roche / Centrafarm*, ECR 1978 01139; ECJ, 10/10/1996, Case C-78/95 *Hendrikman and Feyen / Magenta Druck & Verlag*, ECR 1996 I-04943.

[31] See *Jacoby*, La semaine juridique (2011) p. 1319 et seq. As for the protection of the forum's fundamental policies, a different question has been raised, concerning the absence in the Regulation of a provision on

disparities between the law governing the succession and the *lex fori* in the amount of reserved portions is unlikely to be regarded as incompatible with the public policy of the forum.[32] However, the differences in the protection of family members could justify the recourse to the public policy exception. For instance, the question remains open as regards the case of a foreign law which does not grant any protection at all, or protects certain family members and not others, as in the case of a law protecting the surviving spouse but not the children, or vice versa.[33] Moreover, discriminations in reason of birth, gender, nationality or religion are likely to be considered as contrary to public policy.[34] However, a cautious approach to the application of public policy is necessary.

At Article 40 lit a) of the Regulation, public policy is also recalled as a ground of non-recognition of decisions rendered in another Member State in succession matter falling within the scope of the Regulation.

2.5. Cross-border recognition and enforcement of decisions

In light of its general objective, which is mutual recognition of decisions rendered in Member States in matters of successions, regardless of whether such decisions were given in contentious or non-contentious proceedings, the Regulation on cross-border successions has laid down rules relating to recognition, enforceability and enforcement of decisions (Articles 39-58). These provisions are similar to the provisions adopted with the Brussels I Regulation of 2001, as such establishing an overall coherence in the recognition and enforcement of decisions in civil and commercial matters[35] In the respect of the principle of mutual trust between Member States, the Regulation on cross-border successions will enable recognition of judgments without review of substance or of the applicable law: The Regulation provides for the automatic recognition (i.e., without any special procedure being required) of a judgment rendered in another Member State, with limited grounds for non-recognition. However, Articles 43 - 50 of the Regulation still require an *exequatur* procedure.

By modeling the *exequatur* proceedings according to the Brussels I Regulation, the European legislator copied the grounds for non-recognition of Article 34 of this instrument. However, the question remains whether these grounds for non-recognition are well suited for succession matters.[36] This is certainly the case for the public policy

overriding mandatory rules. It has been pointed out, for instance, that under German law a testator is prevented from making the nursing home in which he lived or its staff members heirs, so as to protect the testator against any abusive influence that could be exercised by his caregivers to his detriment. Such interdiction applies by its own virtue and it could be qualified as an overriding mandatory rule. Under the Regulation, however, the question of overriding mandatory rules and their potential relevance remains uncertain, as a result of the fact that – unlike other instruments of European Union private international law – the Regulation on cross-border successions does not provide on this issue. Cf. *Lein*, YbPIL (2009), p. 107 et seq., esp. at 125-126.

[32] *Bonomi*, NjPR (2010), p. 605 et seq., esp. at 609 et seq.; *Ancel*, in: Baldus/Müller-Graff, Europäisches Privatrecht in Vielfalt geeint Einheitsbildung durch Gruppenbildung im Sachen-, Familien- und Erbrecht? Droit privé européen: l'unité dans la diversité Convergences en droit des biens, de la famille et des successions? (2011), p. 196 et seq.; *Boulanger*, La semaine juridique (2012), 1120 et seq.

[33] *Bonomi*, NjPR (2010), p. 605 et seq., esp. at 609 et seq., *sed contra Dörner*, ZEV (2010), p. 221 et seq.

[34] *Bonomi*, NjPR (2010), p. 605 et seq., esp. at 610.

[35] It should be noted, however, that the Recast of the Regulation Brussels I (as adopted by the Council on 6 December 2012) provides for a further simplification of the rules on recognition which have not been adopted by the Succession Regulation.

[36] The mechanism of Articles 34 et seq. is described by *Hess/Pfeiffer/Schlosser*, Heidelberg Report on the Regulation Brussels I (2008), paras 444 et seq.

clause although this provision will (as the parallel provision of Article 34 (1) of the Brussels I Regulation) be often invoked but seldom applied.[37] The Regulation also provides that a foreign decision shall not be recognized where the foreign judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so. Again, this ground for non-recognition does not seem to be well suited for succession matters where proceedings often start without the knowledge of all interested parties. Therefore, default situations in non-contentious proceedings cannot be assimilated to the default of a defendant in civil litigation. Moreover, recognition shall be refused if the decision is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought. Finally, a decision shall not be recognized if it is irreconcilable with an earlier decision given in another Member State or in a third State in proceedings involving the same cause of action and between the same parties, provided that the earlier decision fulfills the conditions necessary for its recognition in the Member State in which recognition is sought. These provisions have been criticized as they are not consistent with the provisions on pendency (see Articles 17 and 18 of the Regulation).[38] All in all, the simple copying of the recognition regime of the old Brussels I Regulation must be regretted.

2.5.1 Authentic instruments and court settlements

The (indiscriminate) cross-border enforcement of public documents has been the subject of heated debate[39] As provided in Article 3 (1) litt i), an authentic instrument is a public document by which a State agent formally and authoritatively records declarations made by the parties so as to constitute those declarations as legal obligations. However, the concept of authentic instruments has not been entirely clarified. In the context of successions, diverse public instruments may play a role such as documents on the personal or the marital status of a person, documents certifying testaments or the renunciation of a succession. Furthermore, the legal effects of these documents are diverse. Authentic instruments in succession matters may be used, for instance, to provide formal evidence of the existence of a will, or to prove its content, or again to identify the heirs or record their acceptance or rejection of a succession, as well as to record any agreed division of the estate between the heirs.[40]

Authentic instruments' enhanced evidential status appears to offer a means to provide a benefit by sidestepping the obstacles that arise as a result of different civil procedure rules across national borders.[41] Authentic instruments are not a unified legal institution of European law: Rather, they are a nationally variable legal institution, which often

[37] *Hess*, 49 CMLR (2012), p. 1075 et seq., esp. at 1095-1100; *St. Huber*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 45 et seq.

[38] *Hess/Pfeiffer/Schlosser*, Heidelberg Report on the Regulation Brussels I (2008), paras 495 – 497; *St. Huber*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 47.

[39] *Mansel*, RabelsZ (2006), 653 et seq., esp. At 654 et seq.; *Mansel/Coester-Waltjen/Henrich/Kohler*, IPRax (2011), p. 335 et seq.

[40] *St. Huber*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 49 et seq.

[41] *Fitchen*, in JPIL (2012), p. 323 et seq., esp. at 324; see also *Id.*, in JPIL (2011), p. 33 et seq.

can affect cross-border situations. In those Member States that grant executory force to authentic instruments, the holder of the authentic instrument is allowed to directly enforce it without needing to engage in contentious proceedings for recognition. However – unlike a previous draft of the Proposal for a Regulation on cross-border successions, where the recognition (as opposed to the acceptance) of authentic instruments was suggested – according to Article 59 of the Regulation, authentic instruments are not technically recognized, they do not produce *res judicata* effects,[42] and they are, rather, "accepted" (acceptance being considered to be a much less controversial action than recognition)[43]. The practical advantage which Article 59 appears to afford is cost saving for the claimant faced with a cross-border succession.[44] Nonetheless, the term "acceptance" has not been defined in the Regulation, and there remains uncertainty regarding its legal effects, and regarding the real benefit that the provision will offer the claimant, also in light of the fact that, under the Regulation, authentic instruments are subject to *exequatur* proceedings (cf. Article 60 of the Regulation).

Authentic instruments should have the same evidentiary effects in another Member State as they have in the Member State that issued them, or the most comparable effect. The evidentiary effects shall be documented and described by a form which is filled out by the competent authority in the Member State of origin. However, unlike judgments, the legal effects of these instruments are not sufficiently clear. For instance, it remains unclear whether the evidentiary effects relate to the validity of the act (e.g. the validity of a testament) which is documented in the authentic instrument or whether the probative value of the authentic instrument is confined to the effects of the law applicable in the specific case.[45] As this issue had been extensively debated in the legal literature, it should have been addressed by the Regulation.

In view of the heterogeneous evidentiary effects and the variety of public documents in succession cases, further detail would have been required in the wording of the Regulation. Major restrictions not implied in the wording of the Regulation should not be imposed solely by the Recitals. The cross-border enforcement of the issuing State's assumptions regarding authenticity and factual matters seems sensible. The position is different as regards further effects extending to an act or a legal relationship set out in the official document. A substantive examination of the applicable law in the individual case must be carried out before recognizing any cross-border legal effects of the instrument within that framework. This examination should take account, in functional and systematic terms, of the various official documents relevant to succession issues and of their evidentiary effect.[46] What counts in practice, is the legal effect of the instrument under the succession law of the Member State of origin. It goes without saying that 'recognition' of legal effect cannot surpass the original effects of the instrument. If this effect is unknown in the Member State of recognition, an adaptation of the unknown effect to the (mandatory) laws having the most comparable effect is

[42] *Niboyet*, Droit International Privé, 2nd ed., (2009), p. 579.

[43] Ibid., at p.4; *Mansel*, RabelsZ (2006), 654 et seq.

[44] A parallel can be drawn between this provision and the Articles 18 and 19 of Council regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L160/1. Indeed, the empowerment at the Article 59 provision is closely related to the empowerment of the liquidator to collect the debtor's assets on the basis of a certified copy of the decision.

[45] *St. Huber*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 50.

[46] *St. Huber*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 50 et seq.

required (cf. Article 59 (1) in fine).[47] When determining the legal effects of the foreign authentic instrument, the judicial authorities should apply Article 69 of the Regulation by analogy. Any legal effect regarding the entitlement of persons mentioned in the instrument and their capacity to make transaction presupposes that these legal effects are recognized in the Member State of origin and in the Member State where the transaction takes place.

The enforcement of authentic instruments pursuant to Article 60 of the Regulation seems less controversial than acceptance. Article 60 allows an authentic instrument to benefit from a declaration of cross-border enforceability in a manner similar to Article 57 of the Brussels I Regulation.[48] The provision holds, in fact, that an authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party. The court with which an appeal is lodged against the decision on the application for a declaration of enforceability of another Member State's decision under Article 50 shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy in the Member State where enforcement is sought.

Overall, it may be observed that the decision to include an innovative form of acceptance of authentic instruments remains flawed in light of the legal and procedural diversity, which currently characterises the national varieties of the authentic instruments within the legal systems of the European Union. Such diversity, along with a lack of clarity of purpose and function concerning Article 59 in the Regulation, potentially hinders the operation of the provisions concerning authentic instruments. Accordingly, it appears more likely that in cross-border successions authentic instruments will require *exequatur* by means of an Article 60 proceedings.

2.5.2 European Certificate of Succession

The European Certificate of Succession is one of the major innovations introduced with Regulation No. 650/2012. The Certificate of Succession is a standard form certificate designed to enable heirs, legatees, executors or administrators to prove their legal status and/or rights in all EU Member States (with the exception of the UK, Ireland, and Denmark[49]. The European Certificate of Succession should produce the same effects in all Member States, which will clearly increase legal certainty.[50] However, its evidentiary effects should not extend to elements that are not governed by the Regulation, such as questions of affiliation or the question whether a particular asset belonged to the deceased.

The processing of cross-border succession cases will be made easier in legal practice, in particular as regards evidentiary and legitimating effects.[51] This will also apply to Member States where the concept of a certificate does not exist, such as Italy.[52]

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[47] *Mansel*, RabelsZ 2006, 654, 723 et seq.

[48] Here, again, the devil is found in the details, see *Fritsche*, Verfahrenswirkungen und Rechtskraft gerichtlicher Vergleiche (2006).

[49] Article 63 (1).

[50] *Chassaing*, La semaine juridique (2012), p. 1270 et seq.

[51] *Hess/Jayme/Pfeiffer*, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012 – Executive Summary, p. 5.

[52] *Chassaing*, La semaine juridique (2012), p. 1270 et seq.

As regards jurisdiction, the court having jurisdiction for the succession proceedings according to the Regulation is also competent to issue a European Certificate of Succession (Article 64), and the procedure to obtain the Certificate is detailed in Articles 65-68 of the Regulation. The use of a standard form (described by Article 68) is a considerable means as to enhance an efficient and rapid settlement of successions by implementing the free movement of decisions. Article 66 (5) permits a direct exchange of information among the issuing authority and the competent authorities in other EU-Member States disposing of information about the assets of the deceased. The competence for rectifying, modifying or withdrawing the Certificate lies exclusively with the issuing authority in the Member State of origin (Article 71). Redress procedures are equally concentrated in this Member State (Article 72).

The most important provision is Article 69 of the Regulation. It defines the legal effects of the Certificate. The persons designated in the Certificate as heir, legatee, administrator or executor of the will are presumed to dispose of the legal entitlement mentioned there and transactions made by these persons are considered valid unless the other party knows that the statement in the Certificate is inaccurate. However, any application of Article 69 presupposes that the law of the Member State where the transaction takes place permits the legal effects described in the Certificate.[53] In this respect, the Certificate constitutes a valid document for the recording of succession property in the relevant registers.

According to Article 62, the use of the European Certificate of Succession is optional and it should not be a substitute for existing national certificates. However, as the European Certificate of Succession is an optional instrument, it is unlikely that it will be actually often used. Moreover, the relation between the European Certificate of Succession and national certificates has remained unsettled, thus creating considerable uncertainty.[54] In order to avoid friction with existing national certificates of succession and similar documents one option would have been to confine the use of the European Certificate of Successions to the cross-border processing of succession cases (in other words, when there are assets in different Member States). However, this option was not followed in the Regulation.

2.6. Limited territorial scope

The Regulation has a limited territorial scope: In fact, as pointed out at Recitals 82 and 83 Denmark, the United Kingdom and Ireland have not taken part in its adoption, and are not bound by it or subject to its application. Indeed, such a limitation in the Regulation's territorial scope of application partially frustrates the Regulation's aim of creating a uniform European judicial area in civil matters and namely in succession matters.

As for the declining of the United Kingdom to opt in the Regulation, two key problems were highlighted in the Ministry of Justice's public consultation on the matter and confirmed in the Official Report of the House of Commons.[55] The most problematic

[53] *St. Huber*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 57 et seq.

[54] *Jacoby*, La semaine juridique (2012), p. 1122 et seq.; *St. Huber*, in: Hess/Jayme/Pfeiffer, Opinion on the proposal for a European regulation on succession law – Version 2009/157 (COD) of 16 January 2012, p. 58.

[55] Cf. *House of Commons*, Official Report, Parliamentary Debates (Hansard), vol. 502 No. 17, 16 December 2009, col. 140 WS. Cf. also *Harris*, Understanding the English Response to the Europeanisation of Private International Law, JPIL (2008), p. 347 et seq., spec. at p. 365.

concern raised was "clawback", which describes a legal mechanism where gifts made during a person's lifetime can be recouped after their death. The introduction of this concept into the United Kingdom is deemed to potentially create major practical difficulties, particularly for the recipients of such gifts including charities. The second key concern was the proposal's reliance on habitual residence as the sole connecting factor. Using habitual residence in isolation in this way could mean that the relatives of anyone who lived abroad for a relatively short period of time and then died there would find that the deceased's estate was subject to a law with which the deceased had no real connection.[56] Hence, the Government of the United Kingdom concluded that the potential benefits of the Regulation are outweighed by the risks, and therefore decided that the best course of action was not to opt in to the Regulation. This attitude of "legal cherry picking" to the detriment of the European Judicial Area must be regretted.

[56] In this respect, the legal situation in the UK does not differ from the situation in other Member States (e.g. Germany) where the Regulation entails considerable legal change with regard to the connecting factor. However, Recitals 25 and 26 clearly address these concerns and provide for a solution.

CONCLUSIONS

In spite of a dense drafting, which at times appears to lack some clarity, the Regulation features significant and important thrusts and, overall, it can be maintained that the Regulation has met many of its goals. Reasonable predictability of the applicable law, access to justice and consequently freedom of circulation of people find a means of accomplishment in the Regulation's provision of a nearly sole criterion of general jurisdiction and applicable law which clearly brings a strong contribution to the integration of the judicial cooperation in civil matters in the European Union. Similarly, the Regulation's universal scope contributes to uniformity in the solution of succession matters in the European Union by providing that the law of a third State can be applicable under the Regulation.[57] The (albeit limited) favor for party autonomy supports the better localization of the succession and, as such, it fulfills the need for predictability in the regulation of the succession, to the benefit of deceased but also of his heirs, legatees and creditors. However, the rules on jurisdiction do not entirely correspond to the fundamental principle of predictability of jurisdiction. In this respect, the new instrument endorses too much the perspective of conflict of laws. The same critic applies to the subsidiary heads of jurisdiction. The provisions on agreements as to succession and joint and mutual wills clarify the pre-requisites for the verification of their validity and, in perspective, facilitate their acceptance by those legal systems that still oppose their validity on a domestic level.

Moreover and undoubtedly interestingly, in addition to the goals of uniformity and certainty that the institutions of the European Union originally intended to tackle when they adopted the European action plan that led to the adoption of the Regulation on cross-border successions, the Regulation appears to accomplish one further important result: The modernization of the systems of conflicts of jurisdictions and of laws of the Member States of the European Union in succession matters, thus addressing in a modern way the mutated social needs. Such modernization is embodied, *inter alia*, by the adoption of habitual residence (as opposed to nationality) as the general criterion for jurisdiction and applicable law; by the relevance granted to party autonomy; by the uniform provisions on agreements as to successions; by the adoption of the European Certificate of Succession; as well as by the accomplishment of the free movement of judgments in succession matters rendered by the courts of another Member State.

[57] Any application of the laws of a third State is still subject to public policy.

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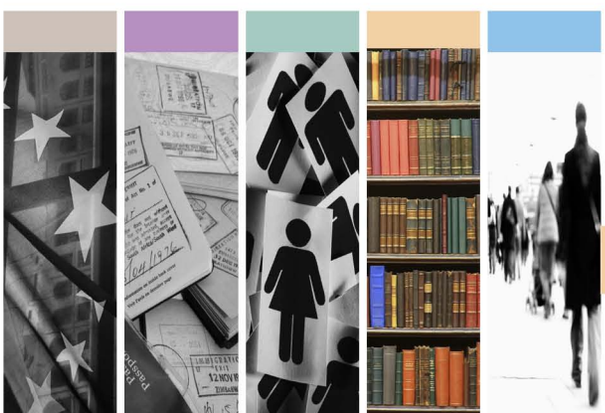

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